

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARTHUR BALDER,

Case No.: 1:22-cv-060401-JLR-SN

Plaintiff,

v.

SUSAN SARANDON; DAVID SHARA;
HONEY SHARA; TIGRAN TSITOGHDZIAN,

Defendants.

X-----X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants Susan Sarandon (“Sarandon”), David Shara (“Shara”), Honey Shara (“Honey Shara”), Tigran Tsitoghdzian (“Tsitoghdzian”)(collectively “Defendants”) submit this memorandum of law in support of their motion to dismiss Plaintiff Arthur Balder’s (“Plaintiff” or “Balder”) Third Amended Complaint (“TAC”).¹ The TAC must be dismissed. Dismissal should be with prejudice as Plaintiff, having multiple opportunities to amend, has utterly failed to allege facts that would state a plausible claim for relief. Plaintiff has no claims and instead is wasting the time and resources of this Court and the Defendants by bringing and prosecuting this lawsuit for the purposes of harassment.

STATEMENT OF FACTS

At the beginning of 2016,² Plaintiff, Tsitoghdzian and Shara allegedly entered into an oral agreement on making a documentary film entitled “American Mirror: Intimations of Immorality” (the “Film”) based on painter and artist Tsitoghdzian. TAC ¶8. Plaintiff claims the oral agreement includes that: (a) Tsitoghdzian expressly promised Plaintiff to present talent releases, as needed (*id.* ¶11); (b) Plaintiff will receive 40% of the film’s profits for his producer services, after recoupment of budget expenses by Shara from revenue, who would have 60% (*id.* ¶10); (c) Plaintiff will receive a 100x75 painting of series “mirrors”, by Tsitoghdzian. (*id.*); and (d) Shara and Tsitoghdzian would be credited as executive producers. (*id.*) (the “Alleged Oral Agreement”). Plaintiff allegedly accepted the painting as upfront compensation “because Tsitoghdzian made constant representations of **value** of Tsitoghdzian’s artworks, mainly based on the auctions results at Phillips Auctioneers LLC, NYC, in 2014 and 2015, **which had been closed at much higher than the appraisal estimations.**” *Id.* ¶11 (emphasis added). In the following months, Plaintiff

¹ The alleged facts in this section are drawn from the TAC, which is annexed to the Declaration of Sarah M. Matz dated March 10, 2023 (the “Matz Decl.”) as Exhibit 3. The paragraph numbers referenced herein are from the 287-page TAC. The inclusion of any of Plaintiff’s allegations in this motion is not a concession of truth by Defendants.

² Plaintiff alleges that Sarandon was invited to participate in the Film in April 2016. TAC ¶14.

allegedly tried to settle a contract with Tsitoghdzyan and Shara, but that those efforts were continuously postponed as the alleged result of Tsitoghdzyan and Shara's excuses. *Id.* ¶19. During negotiations, Shara allegedly wanted to fire the Plaintiff, Tsitoghdzyan allegedly "insulted" Plaintiff in emails and Shara had said that "all was finished" and wanted to get rid of him. *Id.* ¶46, n. 15. In a series of self-serving, conclusory allegations, Plaintiff also alleges that Shara "coerced" Plaintiff to accept disadvantageous terms and said if Plaintiff did not agree to certain terms he would "scrap the project." *Id.* ¶36, n. 37-38.

Plaintiff alleges that on or around April 4, 2017, he and Shara entered into the Producer Agreement (the "Producer Agreement"). TAC, Ex. 7. With respect to the painting and Plaintiff's compensation, the Producer Agreement provided as follows:

That as a compensation of [Plaintiff's] work in the [Film] started in April 2015, the [Plaintiff] will receive from [Shara] an original painting hand-made by artist Tigran Tsitoghdzyan. [Shara] agree[d] that it will be a painting of the series 'Mirrors' portraying [Plaintiff's] wife, Bella Jazmin de la Guia, no later than the last day of the month of May in the year 2017, and that **the painting will be 75x50 inch.**

Thus [Plaintiff] agree[d] that he thereto renounces to any additional upfront compensation calculated on the production budget of the film, but **[Plaintiff] will have 20% of profits, i.e., once final production budget recouped.**

TAC, Ex. 7, p.1 (emphasis added). For payment for expenses, the Producer Agreement provides:

The final production budget will be the result of the sum of all production expenses that have taken place until date and also adding those that may take place until the final termination of the [Film].

[Plaintiff] will provide and pay all additional Color Correction and Editing of the [Film] and other parts of the [Film] yet to be filmed without further production cost hereto and will provide any additional directorial and producer's work and scripts necessary to ensure the best result in such cases.

[Shara] agrees he will pay any additional costs to composer of original soundtrack, and [Plaintiff] will provide the composer any necessary files to ensure the optimal performance of his work.

If any additional production costs would be necessary beyond what has been

already done to date, i.e., renting camera equipment, cameras, or lenses, for any additional shootings, etc., **[Shara] would have to provide additional funds upon approval of new estimations and new budget.**

Id. (emphasis added). As to distribution, the Producer Agreement provides that:

[Plaintiff] will inform and discuss any **distribution possibilities** with [Shara], both being informed in due time to ensure the best performance possible of the business.

[Plaintiff] cannot make any decision regarding distribution without contacting and getting written confirmation by [Shara]. Revenues have to be paid directly to [Shara], being distribution contracts always under his surveillance and executed according to his criteria.

Id. Pg. 2. (emphasis added). Lastly, the Producer Agreement provided that the parties “agree to the listed terms listed above signing all TWO pages of the agreement.” *Id.* The TAC’s relevant allegations of the parties’ interactions and breakdown of their relationship are referenced.

STANDARD OF REVIEW

On a Rule 12(b)(6) motion, the Court must draw all reasonable inferences in Plaintiff’s favor and must take as true the facts alleged in the plaintiff’s complaint. *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). However, a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v Iqbal*, 556 U.S. 662, 663 (2009). Courts may not “accept as true a legal conclusion couched as a factual allegation,” and [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft*, 556 US at 678. “[A] formulaic recitation of the elements of a cause of action will not do ... Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.*

A court should not “accept as truth conflicting pleadings that make no sense, or that would render a claim incoherent, or that are contradicted either by statements in the complaint itself or

by documents upon which its pleading rely, or by factors of which the court may take judicial notice.” *In re Livent Inc. Noteholders Sec. Litig.*, 151 F.Supp.2d 371, 405-406 (S.D.N.Y. 2001)(citations omitted); *TufAmerica, Inc. v. Diamond*, 968 F.Supp.2d 588, 592 (S.D.N.Y. 2013)(“If a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true.”). “[A] district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.” *DiFolco v MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010)(internal citations omitted).

I. ALL OF PLAINTIFF’S BREACH OF CONTRACT CLAIMS FAIL

A. Plaintiff Failed To Sufficiently Allege Shara’s Breach of the Producer Agreement

The elements of a cause of action for breach of contract are the existence of an agreement, performance by the plaintiff, breach of contract by the defendant, and resulting damage. *McCabe v. ConAgra Foods, Inc.*, 681 F. App’x 82, 84 (2d Cir. 2017). “[A] plaintiff must identify what provisions of the contract were breached as a result of the acts at issue.” *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 189 (S.D.N.Y. 2011)(quoting *Wolff v. Rare Medium, Inc.*, 171 F.Supp.2d 354, 358 (S.D.N.Y.2001)(dismissing breach claim because plaintiffs failed to identify the contractual provisions that defendant breached)). “Stating in a conclusory manner that an agreement was breached does not sustain a claim of breach of contract.” *Id.* In determining obligations, “the initial interpretation of a contract is a matter of law for the court to decide.” *Id.* (citing *K. Bell & Assocs., Inc. v. Lloyd's Underwriters*, 97 F.3d 632, 637 (2d Cir.1996)). “[W]here there is no contractual obligation between two parties, there can be no breach of contract claim.” *Flatiron Acquisition Vehicle, LLC v. CSE Mortg. LLC*, 2019 WL 1244294, at *13 (S.D.N.Y. 2019)(citing *Fleissler v. Bayroff*, 266 A.D.2d 34, 34-46 (1st Dep’t 1998); *Davantzis v. PaineWebber Inc.*, 2001 WL 1423519, at *3 (N.Y.Sup.Ct. 2001)(same and “when the essential

elements of the contract are not specified, there can be no breach claim’’)).

The TAC is rife with allegations that Shara did not undertake actions that were actually obligations in the Producer’s Agreement. *Flatiron Acquisition Vehicle, LLC*, 2019 WL 1244294, at *13 (citing *Ross v. FSG PrivatAir, Inc.*, 2004 WL 1837366, at *3-5, 8 (S.D.N.Y. 2004))(dismissing plaintiff’s breach claim after determining that the contract provisions allegedly breached were not set forth in the contract). Allegations of obligations not in the Producer Agreement are also properly disregarded because they are contradicted by terms in the Producer Agreement. *Matusovsky v. Merrill Lynch*, 186 F.Supp.2d 397, 399-400 (S.D.N.Y. 2002).

Plaintiff’s allegation that Shara failed to provide written talent releases (TAC ¶45 n. 46) cannot constitute a breach as there was no obligation for Shara to provide them in the Producer Agreement. *See generally* Producer Agreement. The allegations that Plaintiff was not given a 100x75 inch painting (TAC ¶70), also fails as the Producer Agreement provided for a 75x50 inch painting.³ *See* Producer Agreement. Similarly, Plaintiff’s allegations that the painting he received was of lower value and inferior quantity than what was promised to him also do not support a claim for breach (TAC ¶¶310, 335), as the Producer Agreement did not specify those items. Producers’ Agreement. Plaintiff’s allegations that Shara failed to pay various invoices for the Film (TAC ¶¶217, 349, 358), also fail to make out a plausible claim for breach. Plaintiff was responsible for most costs. Producer Agreement, p.1 (Plaintiff will “pay all additional Color Correction and Editing of the film and other parts of the film yet to be filmed without further production cost hereto’’). Shara was only responsible if there was a new approved budget. As Plaintiff has failed to allege any factual content regarding what was contained in the invoices, or that they were part

³ Plaintiff’s conclusory allegation that he was coerced to accept a downsize of the painting in order to sign the Producers’ Agreement is conclusory and irrelevant where he acknowledges he agreed to accept it, and the other prior alleged promises are unenforceable for the reasons set forth below. TAC ¶318; *IB. supra*. Also, Plaintiff’s allegation that the painting was late does not constitute a material breach nor has Plaintiff alleged damages associated with it.

of an approved budget there is no plausible inference that Shara was responsible for them. Lastly, Plaintiff's allegations that Shara decided he did not want to engage in two future projects with Plaintiff about the biggest diamond ever mined in Canada and Nazi propaganda (TAC ¶296), also fail as Shara had no obligation to so under the Producer Agreement

Plaintiff's allegations that Shara breached an express obligation or his duty of good faith and fair dealing by cancelling the festivals, not providing consent to distribute the Film and/or not doing so by a particular date, are also insufficient to state a claim for breach.

Shara's alleged withholding of consent does not constitute a breach of the duty of good faith and fair dealing. "The covenant of good faith and fair dealing does not create obligations beyond those expressly set forth in the contract." *In re Basic Food Grp., LLC*, 2018 WL 5805943, at *9 (Bankr. S.D.N.Y. 2018)(citing *Granite Partners, L.P. v. Bear Stearns & Co. Inc.*, 17 F.Supp.2d 275, 306 (S.D.N.Y. 1998)("the duty cannot be used to create independent obligations beyond those agreed upon and stated in the express language of the contract.")); *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 198-99 (2d Cir. 2005)("It does not add to the contract a substantive provision not included by the parties."); *Wolff v Rare Medium, Inc.*, 210 F.Supp.2d 490, 497 (S.D.N.Y. 2002), *affd*, 65 Fed Appx 736 (2d Cir. 2003)(same).

The law is clear that in instances like here, where Plaintiff has agreed to obtain the other party's consent as a condition to proceeding and the contract sets no express restrictions on the right to withhold consent, consent may be withheld for any reason or no reason and implying a duty otherwise is inconsistent with the Producer Agreement's terms. *Teachers Ins. & Annuity Ass'n of America v. Wometco Enterprises*, 833 F.Supp. 344, 349 (S.D.N.Y. 1993)("[I]n the absence of explicit contractual language stating that a party may not unreasonably withhold consent, parties may withhold consent for any reason or no reason, and ... no implied obligation to act in good faith

exists to limit that choice.”); *Dress Shirt Sales v. Hotel Martinique Assoc.*, 12 N.Y.2d 339, 342 (1963)(unless the contract provides that “consent shall not be unreasonably withheld,” the agreement permits party to refuse consent “arbitrarily for any reason or no reason.”)).

That the “decision not to grant consent may have ‘incidentally lessen[ed] [Plaintiff]’s anticipated fruits from the contract,” is not a breach of the implied covenant. *Semple*, 2009 WL 1457163, at *7 (citing *Thyroff v Nationwide Mut. Ins. Co.*, 460 F.3d 400, 408 (2d Cir 2006), *certified question accepted*, 7 N.Y.3d 837 (2006), and *certified question answered*, 8 N.Y.3d 283 (2007), *certified question accepted*, 7 N.Y.3d 837 (2006), and *certified question answered*, 8 N.Y.3d 283 (2007)); *see also M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990)(the implied covenant does not extend to undermine a party’s right to act on its own interests in a way that may incidentally lessen the other party’s anticipated fruits). To hold otherwise “would unjustifiably frustrate the expectations of the parties as made explicit in the contract” and would violate “the well-established principle that the implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract.” *Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 A.D.3d 549 (1st Dep’t 2008).

The Producer Agreement does not contain any restrictions on withholding consent and Plaintiff cannot create an implied duty that is inconsistent with the Producer Agreement. Even if an implied duty existed, the allegations that Shara (i) would not provide written consent for a distribution agreement without all appropriate written permissions, which could lead to claims for copyright infringement⁴ and violations of §§50 and 51; (ii) voiced his concerns over Plaintiff’s unacceptable and rude communications with third parties; (iii) encouraged Plaintiff to apologize to Sarandon and be nice after the wildly unprofessional email Plaintiff sent to her and Tsitoghdzyan

⁴ Plaintiff has alleged that Phillips Auctioneers prohibited use of their footage in the Film. TAC ¶226.

(TAC ¶¶164, 168); and (iv) allegedly attempted, but failed, to enter into a modified agreement so that Sarandon and Tsitoghdzian would provide appearance releases that were needed (*id.* ¶¶236),⁵ could not raise a plausible inference of a breach of an implied duty.

B. Plaintiffs Contract claim Against Shara and Tsitoghdzian Based n Alleged Discussions/Oral Agreements Outside of the Producer Agreement Also Fail

1. The Alleged Oral Agreement is Barred by the Statute of Frauds

The Statute of Frauds requires an agreement to be in writing, and signed by the party to be charged, if it cannot be performed within one year from the date of its making. N.Y. GEN. OBLIG. LAW § 5-701(a)(1); *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 455-58 (1984); *Belfert v. Peoples Planning Corp. of Am.*, 202 N.Y.S.2d 101, 101 (1st Dep’t 1960); *City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716, 726 (S.D.N.Y. 1986), *aff’d*, 844 F.2d 42 (2d Cir. 1988). When an agreement falls within the statute of frauds and is not memorialized in writing –the agreement is void and unenforceable. *D & N Boening, Inc.*, 63 N.Y.2d at 458; *Belfert*, 202 N.Y.S.2d at 101. For a writing to satisfy the Statute of Frauds, in addition to being signed by the party to be charged, it “must designate the parties, identify and describe the subject matter and state all the essential and material terms of the agreement.” *Guzzo v. Easterntech Elecs., Inc.*, 446 N.Y.S.2d 582, 583 (3d Dep’t 1982); *Nesbitt v. Penalver*, 835 N.Y.S.2d 426, 428 (2d Dep’t 2007).

The purpose of the Statute of Frauds is “to protect people from alleged contractual obligations not supported by written evidence.” *Zeising v Kelly*, 152 F.Supp.2d 335, 343 (S.D.N.Y. 2001). As such, consideration of the Statute of Frauds “is appropriate on a motion to dismiss, as such a motion is intended to weed out meritless claims.” *Zeising*, 152 F Supp 2d at 343. Courts consistently dismiss breach of contract claims under motions to dismiss based on the statute of frauds. *Gutkowski v. Steinbrenner*, 680 F. Supp. 2d 602, 613 (S.D.N.Y. 2010).

⁵ These communications which were clearly intended to resolve a dispute are also likely barred under FRE § 408.

The Alleged Oral Agreement clearly falls within the Statute of Frauds as it was intended to last longer than a year. Plaintiff's conclusory allegation that the Alleged Oral Agreement was to be performed within one year is insufficient, and not entitled to a presumption of truth as it is contradicted by Plaintiff's other allegations. *In re Livent Inc. Noteholders Sec. Litig.* at 405-406; *Diamond*, at 588, 592 (S.D.N.Y. 2013).

The written Producer Agreement states that the work on the Film started in 2015. SAC, Ex. 1, p1. According to Plaintiff, the Alleged Oral Agreement was made in the beginning of 2016. TAC ¶8. Plaintiff has also clearly alleged that a documentary like this should take "two years for its production and film festival run" (SAC ¶113) with distribution following that.

Tsitoghdzian's email that "if you had a proper contract with producer, you will be in charge and penalized for 12 month late" refers to a financial penalty after 12 months and is not referring to the time frame for the performance of the Alleged Oral Agreement. *Id.* ¶7 n. 4. Indeed there are no factual allegations that would allow a plausible inference that the Alleged Oral Agreement was to be performed within one year. Moreover, Plaintiff's disingenuous attempt to avoid the statute of frauds by omitting his prior allegations that expressly made the Alleged Oral Agreement fall within the statute of frauds cannot be condoned by this Court.

The Court can and should consider Plaintiff's prior inconsistent allegations, especially where as here he is engaging in gamesmanship and pleading tactics to avoid the legal consequences of factual allegations. *Colliton v Cravath, Swaine & Moore LLP*, 45 Employee Benefits Cas 1276 [SDNY Sept. 24, 2008], *aff'd*, 356 Fed Appx 535 (2d Cir 2009). Under Rule 11(b)(3), plaintiffs must have an adequate, non-frivolous basis in fact for their claims. It is clear that sanctions are appropriate where facts have been "concocted." *Levine v. F.D.I.C.* 2 F.3d 476, 479 (2d Cir.1993)("the creativity of an attorney may not transcend the facts of a given case; counsel in his

attempts at creativity concocted 'facts' that were not well grounded, and therefore exceeded the bounds of conduct ... incorporated in Fed.R.Civ.P. 11.” (internal quotation omitted). Self-contradictory assertions, clearly lack reasonable evidentiary support, in violation of Rule 11(b)(3). *Polar Int'l Brokerage Corp. v. Reeve*, 196 F.R.D. 13, 18 (S.D.N.Y.2000) *aff'd in part, dismissed in part on other grounds sub. nom., Corroon v. Reeve*, 258 F.3d 86 (2d Cir.2001).

Plaintiff expressly and clearly alleged in his Second Amended Complaint (“SAC”) that the Alleged Oral Agreement anticipated finishing the Film by “mid-2017” and sometime thereafter would be “distributed commercially after an initial film festival run” (SAC ¶1). It was also alleged that a documentary like this should take “two years for its production and film festival run” (SAC ¶113) with distribution following that. Obligations extending to early 2016 to well past mid-2017, and with ongoing payments⁶ from any distribution contract after expenses were recouped, clearly contemplates that the relationship would last longer than a year, and thus is within the statute of frauds. Plaintiff’s bad faith omission of those factual allegations here and replacement of conclusory allegations that contradict those factual allegations must be rejected by this Court. The Court can and should consider Plaintiff’s prior factual allegations regarding the time frame of performance under the Alleged Oral Agreement. Accordingly, the Court should find that the claim is barred by the statute of frauds.

Plaintiff has also failed to allege any writing that contains all of the material terms of the Alleged Oral Agreement entered into by Shara or Tsitoghdzian, the parties being charged. While the Producer Agreement contains some of the terms, it does not contain them all, including that

⁶ Contracts of indefinite duration are also deemed to be incapable of being performed within a year, and thus fall within the ambit of the Statute of Frauds.” *In re Bayou Hedge Fund Litig.*, 534 F. Supp. 2d 405, 419 (S.D.N.Y. 2007), *aff'd sub nom. S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98 (2d Cir. 2009)(citing *Computech Intern., Inc. v. Compaq Computer Corp.*, 2002 WL 31398933, at *3 (S.D.N.Y. 2002); *United Beer Distrib. Co., Inc. v. Hiram Walker (N.Y.) Inc.*, 163 A.D.2d 79 (1st Dep’t 1990)).

“Tsitoghdzyan would provide any written permissions that would be necessary in the future” (TAC ¶10) and that “Shara promised to obtain the signed talent release of the people” they invited (*id.* ¶93). As such, the Court cannot enforce terms that are not in the Producer Agreement.⁷

2. Allegations Concerning the Parties’ Conversations Prior to the Producer Agreement are Barred by the Parol Evidence Rule

“[A] contract which appears complete on its face is an integrated agreement as a matter of law.” *Battery Steamship Corp. v. Refineria Panama, S.A.*, 513 F.2d 735, 738 n. 3 (2d Cir.1975)(citation omitted); *see Raine v Paramount Pictures Corp.* 1998 WL 655545, at *16 n. 12 (S.D.N.Y.1998). An integrated contract is one which “represents the entire understanding of the parties to the transaction.” *Investors Ins. Co. v. Donricnco Reinsurance. Co*, 917 F.2d 100, 104 (2d. Cir. 1990). If the written document ““appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, [then] it constitutes the contract between them, and is presumed to contain the whole of that contract.”” *Adler & Shaykin v. Wachner*, 721 F.Supp. 472, 476–77 (S.D.N.Y. 1988)(quotation omitted). Where a “contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence.” *RJE Corp. v. Northville Indus. Corp.*, 329 F.3d 310, 314 (2d Cir. 2003)(citations omitted).

The Producer Agreement includes clear integration language directly prior to the signatory lines that “the producers agree to the listed terms listed above signing TWO pages of the agreement.” *See* Producer Agreement, p.2. The parties intended the Producer Agreement that

⁷ To the extent Plaintiff was trying to enforce them, the alleged oral agreements for an indefinite performance concerning the other two projects the parties allegedly discussed (*id.* ¶134), which Plaintiff’s implies were similar two-year projects and which David Shara could not terminate at will, also violate the statute of frauds. *See Belfert*, 202 N.Y.S.2d at 101 (“The oral options exercisable by the [plaintiff] alone constitute the contract was one not performable within a year.”); *Zaitsec v. Solomon Bros., Inc.*, 60 F.3d 1001, 1003 (2d Cir. 1995)(“if performance within one year depends upon an act solely within the control of the party seeking to enforce the oral agreement, the Statute of Frauds remains applicable.”).

consists of two pages to include all of the terms of their agreement, and as such, extrinsic evidence of other alleged oral conversations, including those about written releases and the value and/or quality of the painting cannot be considered.

C. Alleged Discussions with Shara About Future Projects are Not Enforceable

Existence of a contract requires “an offer, acceptance, consideration, mutual assent and intent to be bound.” *Prince of Peace Enterprises, Inc. v. Top Quality Food Mkt., LLC*, 760 F. Supp. 2d 384, 397 (S.D.N.Y. 2011), *adhered to on denial of reconsideration*, 2011 WL 650799 (S.D.N.Y. 2011)(citing *Benicorp Ins. Co. v. Nat'l Med. Health Card Sys., Inc.*, 447 F.Supp.2d 329, 337 (S.D.N.Y. 2006)). Mutual assent requires “a meeting of the minds of the parties, and, if there is no meeting of the minds on all essential terms, there is no contract.” *Id.* Under New York law, “[m]utual assent is essential to the formation of a contract...” *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004). Plaintiff’s TAC is devoid of any allegations that Plaintiff and Shara came to any meeting of the mind concerning the two future projects. Plaintiff’s only allegation is that Shara said he was finding sponsors, however Plaintiff has not alleged an offer, acceptance, consideration for Shara or any meeting of the minds. As such, there could be no enforceable agreement with respect to those projects.

D. Plaintiff Failed to Sufficiently Allege an Enforceable Contract Against Sarandon

The elements of contract formation are (1) offer, (2) acceptance, (3) consideration, (4) mutual assent, and (5) a mutual intent to be bound. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir.2004). “The fundamental basis of a valid, enforceable contract is a meeting of the minds of the parties, and, if there is no meeting of the minds on all essential terms, there is no contract.” *Benicorp Ins. Co. v. Nat'l Med. Health Card Sys., Inc.*, 447 F. Supp. 2d 329, 337 (S.D.N.Y. 2006). “The offer, acceptance, and manifestation of intent do not need to extend to every potential contract term — only the material terms.” *Geneva Lab'ys Ltd. v. Nike W. Afr. Imp. &*

Exp., Inc., 2022 WL 673257, at *5 (E.D.N.Y. Mar. 7, 2022). “If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract.” *Caro Cap., LLC v. Koch*, 2021 WL 1595843, at *7 (S.D.N.Y. Apr. 23, 2021), *on reconsideration*, 2021 WL 2075481 (S.D.N.Y. May 24, 2021)(quoting *66 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 575 N.E.2d 104, 106 (N.Y. 1991)). Absent “content [as] to the nature and quantity of the alleged obligation ... there is no basis for the Court to determine whether there was a meeting of the minds or that [a party] performed their obligations so as to be able to hold the [counterparty] in breach.” *Id.* “New York law requires that ‘an agreement [be] reasonably certain in its material terms,’ not just some of its material terms.” *Id.* (quoting *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 548 N.E.2d 203, 206 (N.Y. 1989)). “Whether there has been a meeting of the minds on all essential terms is a question of fact that must be resolved by analyzing the totality of the circumstances.” *Benicorp Ins. Co.*, 447 F. Supp. 2d at 337.

Plaintiff has failed to allege sufficient facts to give rise to a plausible inference that there was ever an agreement reached with Sarandon. There are simply no factual allegations that would support that there was a meeting of the minds, with respect to what Plaintiff proposed. TAC ¶98. Plaintiff alleges that he offered two prints by Tsitoghdzyan, which he has not pled any basis to be able to offer as he did not own or have the right to have Tsitoghdzyan create two prints, as compensation for her participation in the Film. *Id.* Additionally, Plaintiff alleges to have asked Sarandon to conduct PR for the film. *Id.* However, Plaintiff’s own allegations show that Sarandon did not accept. *Id.* Plaintiff’s own pleading indicates that Sarandon stated that she did not want prints that were “gigantic.” *Id.* As to the proposal to do PR for the Film, Sarandon did not accept she said, “there’s no way to know it that would be possible at this point, we’d just have to wait...” *Id.* This is not a manifestation of a meeting of the minds on terms of an agreement, moreover there

is no allegation that Plaintiff provided any consideration. That Sarandon received a print from Tsitoghdzian is not consideration from Plaintiff, as Plaintiff has not alleged that he provided it, nor would it be indicative of a contract with *Plaintiff*, as opposed to a contract with Tsitoghdzian or David Shara. It is clear from Plaintiff's own allegations that there was no assent by Sarandon, and as such, there was never a valid contract between Plaintiff and Sarandon. Accordingly, Plaintiff's breach of contract claim against Sarandon must be denied.

II. PLAINTIFF HAS ALSO FAILED TO SUFFICIENTLY ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT AND BUSINESS RELATIONS AGAINST SARANDON, HONEY SHARA AND TSITOGHDZIAN

Under New York law, “[t]ortious interference with contract requires the (1) existence of a valid contract between the plaintiff and a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional procurement of the third-party's breach of the contract without justification, (4) actual breach of the contract, and damages resulting therefrom.” *Valley Lane Indus. Co. v. Victoria's Secret Direct Brand Mgmt., L.L.C.*, 455 F. App'x 102, 104 (2d Cir. 2012); *See also Rich v Fox News Network, LLC*, 939 F.3d 112 (2d Cir. 2019); *Knopf v Phillips*, 802 F. Appx 639, 642 (2d Cir. 2020). To state a claim for tortious interference with business relations, a plaintiff must adequately allege that: “(1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant's acts injured the relationship.” *Valley Lane Indus. Co.*, 455 F. App'x at 105.

A. Plaintiff has Still Failed to Plausibly Allege Breach of an Identified Agreement

1. Plaintiff Failed to Allege that the Producer Agreement was Actually Breached

A plaintiff cannot prevail on an intentional interference claim unless it demonstrates an actual breach of the specified contract. *See NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614, 620-21 (1996); *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 402 (2d Cir.

2006)(affirming dismissal of a tortious interference with contract claim on the basis that “plaintiffs fail[ed] to allege ... actual breach” of a contract where the alleged acts did “not amount to an allegation that [the contracting party] violated the terms of a contract”); *Skyline Travel, Inc. v. Emirates*, 2011 WL 1239783, at *5 (S.D.N.Y. 2011)(breaches cannot be described in conclusory terms), *aff’d*, 476 F.App’x 480 (2d Cir. 2012).

As set forth in Section I(A), Plaintiff has failed to allege conduct that resulted in an actual breach of the Producer Agreement. That is especially true where none of the outcomes would constitute a breach and Plaintiff has not identified particular provisions that were breached. *Ace Arts, LLC v. Sony/ATV Music Pub., LLC*, 56 F. Supp. 3d 436, 450–51 (S.D.N.Y. 2014)(pleading in “a conclusory manner that an agreement was breached” is not enough and holding that cancelling premiere after plaintiffs failed to produce written confirmation of right to use songs, did not constitute a breach, because it left open the possibility of lawful termination). Allegations that the remaining Defendants caused Shara to walk away also do not constitute a breach. *Kirch*, 449 F3d at 402 (allegation that third party “walked away” from project was insufficient to satisfy breach). Shara had the right to undertake the alleged actions—as such there was no breach.

Additionally, the allegations that (i) Sarandon and Tsitoghdzyan did not provide written name and likeness releases, (ii) that Sarandon did not engage with press for the film, (iii) that Honey Shara⁸ did not pay invoices for Shara, and (iv) that Honey Shara asked Plaintiff to send a copy of the Film to Tsitoghdzyan or ask for financial information (TAC ¶¶193, 211, 232, 301) also cannot support this claim where they were not breaches of the Producer Agreement. The allegations that the other two projects were cancelled (*id.* ¶¶179, 228, 338) are also not breaches as

⁸ Given the allegations in the TAC regarding Honey Shara being a “partner of David Shara” (TAC ¶128), Honey Shara also cannot be liable as an alleged agent of a disclosed principal. See *Dietrich v. U.S. Shipping Bd. Emergency Fleet Corp.*, 9 F.2d 733, 739 (2d Cir. 1925)(“Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable, unless he agreed to be so.”).

there was no enforceable agreement requiring Shara to ensure they proceed. *Cohen v Brunswick Record Corp.*, 31 Misc 2d 525, 527 (Sup. Ct. 1961)(exercise of a legal right to terminate agreement cannot be the subject of action against a third party). For this reason alone, this claim fails.

2. Plaintiff has Failed to Identify Other Third-Party Contracts that were Breached or Potential Customers that Were Lost

To state a claim for tortious interference with contract, a “plaintiff must identify the specific third-party contract with which the defendant allegedly interfered.” *Corning Inc. v. Shenzhen Xinhao Photoelectric Tech. Co.*, 546 F. Supp. 3d 204, 211 (W.D.N.Y. 2021); *Valley Lane Industries Co.*, 455 Fed Appx at 104. Further, it is not enough to describe the contract in general terms, though; “[i]t is imperative that, in bringing a tortious interference claim, a plaintiff identify ‘the relevant terms of the contract [] that existed’ that were breached by defendant.” *Corning Inc.*, 546 F. Supp. 3d at 211; *Alvarado v. Mount Pleasant Cottage Sch. Dist.*, 404 F.Supp.3d 763, 791 (S.D.N.Y. 2019).

To assert a cause of action for interference with prospective economic advantage tortious interference, the plaintiff must “identify the potential customers at issue...” *Corning Incorporated*, 546 F Supp 3d at 216 (citing *Lesesne v. Brimecome*, 918 F.Supp.2d 221, 227 (S.D.N.Y. 2013); *Kid Car NY, LLC v. Kidmoto Techs. LLC*, 518 F.Supp.3d 740, 762, (S.D.N.Y. 2021)(failing “to identify a specific business relationship, its claim for tortious interference with prospective business advantage cannot survive a motion to dismiss”). Similarly, a plaintiff must identify any particular prospective [contract] it would have obtained or any existing [contract] that would have expanded but for defendants' conduct. *In Touch Concepts, Inc. v Cellco Partnership*, 949 F Supp 2d 447, 478 (S.D.N.Y. 2013), *adhered to on denial of reconsideration*, 2013 WL 6182949 (S.D.N.Y 2013), *affd*, 788 F3d 98 (2d Cir. 2015)(citing *Learning Annex Holdings, LLC v. Gittelman*, 48 A.D.3d 211, 211, 850 N.Y.S.2d 422 (1st Dep’t 2008)(claim was not viable since plaintiff failed to identify

any specific customers it would have obtained but for defendant's actions)); *Vigoda v. DCA Prods. Plus Inc.*, 293 A.D.2d 265, 267 (1st Dep't 2002)(failure to name "parties to any specific contract they would have obtained had they performed at the...showcase, they have failed to satisfy the 'but for' causation required").

Outside of the Producer Agreement, despite knowing about the issues with his prior pleading, Plaintiff has still failed to alleged any specific valid contract or its specific terms, that Honey Shara, Sarandon or Tsitoghdzyan induced the breach of. Similarly, Plaintiff failed to specifically allege customers that were lost or facts identifying a plausible continuing business or other customary relationship not amounting to a formal contract that was interfered with. Despite Plaintiff being on notice of the deficiencies in his prior pleadings, the TAC still contains conclusory allegations that Plaintiff had important conversations related to "international distributors,"⁹ that Defendants interfered with both the distribution of the firm and his "other professional endeavors" or that he could not raise money for the Francis Bacon project (TAC ¶¶208, 219-220, 236), which are entirely insufficient to state a plausible claim for relief. Plaintiff clearly cannot cure these deficiencies, and as such, these claims fail.

B. Plaintiff Failed to Sufficiently Allege Knowledge or Intentional Procurement of an Alleged Breach

"[G]eneral claim of [a defendant's] knowledge of the contracts" insufficient to show that defendant "was aware of the limitations [the contracts] imposed." *Medtech Products Inc.*, 596 F Supp 2d 778 at 813 (S.D.N.Y. 2008); *Wolff*, 171 F Supp 2d at 359. "[T]o avoid dismissal of a tortious interference with contract claim a plaintiff must support his [] claim with more than mere

⁹ The one potential contract Plaintiff identifies i.e., that Mad Solutions an all-channel approach (TAC ¶200), is conclusory and insufficient as Plaintiff has still failed to plead facts to support that the opportunity was real and failed to plead but for causation. Clearly Plaintiff cannot adequately plead this claim. Moreover, it was not a breach for David Shara to withhold consent for distribution. See Point II) *supra*.

speculation.” *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep’t 2006). Plaintiff still fails to allege facts to create a plausible inference that these defendants had knowledge of the Producer Agreement or what terms were breached. TAC ¶¶259, 291, 341-342, 344.

Moreover, “[t]o satisfy the third element of the claim, intentional procurement of the breach, ‘it is not enough that a defendant engaged in conduct with a third-party that happened to constitute a breach of the third party’s contract with the plaintiff; instead a plaintiff must allege facts showing that the defendant’s objective was to procure such a breach.’” *Corning Inc.*, 546 F.Supp.3d at 212-13 (internal citations omitted). Although the defendant need not have acted out of malice, “the interference must be intentional and an interference that is merely an intrusion that is negligent or incident to some other lawful purpose is not enough.” *Northern Shipping Funds I, L.L.C. v. Icon Capital Corp. Eyeglasses*, 2013 WL 1500333, at *4 (S.D.N.Y. 2013).

Plaintiff has again failed to sufficiently plead facts that create a plausible inference that the Defendants’ objective was to procure a breach of the Producer Agreement. Plaintiff’s allegations that the Defendants did not provide releases, that Sarandon sent Shara the email that Plaintiff sent to her, or that Honey Shara did not pay invoices for Shara (TAC ¶¶169, 182, 263), are not intentional acts with the objective or procuring a breach.

C. Plaintiff Also Failed to Allege Wrongful Means Without Justification or Unlawful Conduct

Moreover, a plaintiff must allege that the “defendant used ‘wrongful means’ to induce the third party to breach the contract.” *Orange Cnty. Choppers, Inc. v. Olaes Enterprises, Inc.*, 497 F. Supp. 2d 541, 561–62 (S.D.N.Y. 2007)(citing *Wolff*, 210 F.Supp.2d at 499; *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 428 N.Y.S.2d 628, 631–32 (1980)). “‘Wrongful means’ includes physical violence, fraud, or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure.” *Id.* Where a suit is based on interference with a nonbinding

relationship, the plaintiff must show that defendant's conduct was not "lawful" but "more culpable." *JBCHoldings NY, LLC v Pakter*, 931 F Supp 2d 514, 535 (S.D.N.Y. 2013). The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort. *Id.* Conduct that is not criminal or tortious will generally be "lawful" and thus insufficiently "culpable" to create liability for interference with prospective contracts or other nonbinding economic relations. *Id.*, citing *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004).

Despite being on notice of the deficiencies in his prior pleading, Plaintiff has still utterly failed to plead any conduct that was wrongful or unlawful. Sarandon and Tsitoghdzyan exercising a legal right to control their publicity rights, Sarandon not participating in marketing and saying she did not want to be and was not associated with the Film, and that Honey Shara did not pay invoices for her son Shara (TAC ¶¶182, 190, 263) are not wrongful means or unlawful conduct. To the contrary, they are lawful exercises of rights. Similarly, Sarandon forwarding Plaintiff's shockingly rude and unprofessional emails accusing Sarandon of having an affair with Tsitoghdzyan and impugning her and her body of work is also not unlawful conduct.¹⁰ Plaintiff's allegation that Sarandon allegedly "unduly harassed with threats of litigation," and requested that the festival circuit be cancelled and that other projects be cancelled (*id.* ¶296), is also not wrongful means or unlawful conduct.¹¹ Sarandon had no obligation to work with Plaintiff or want to be associated with him and Plaintiff sent that email knowing that. Plaintiff's other conclusory allegations that (i) Sarandon did "all in her power to thwart the festival circuit" (*id.* ¶296), (ii) that

¹⁰ The email incorporated by reference and quoted in ¶64 of the TAC is annexed to the Matz Decl., as Ex. 2. This email may be properly considered on this motion. *DiFolco*, 622 F.3d at 111.

¹¹ Plaintiff has not pled conduct that would make threats of litigation a wrongful mean. The threat of litigation, is only a wrongful means if (1) "the [claimant] has no belief in the merit of the litigation" or, (2) "having some belief in the merit of the suit, [the claimant] nevertheless institutes or threatens to institute litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication." *RFP LLC v. SCVNGR, Inc.*, 788 F. Supp. 2d 191, 197 (S.D.N.Y. 2011)(citing *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 797 F.2d 70, 75 (2d Cir.1986)). Plaintiff has not pled any facts that would show that threats had no merit or were only for the purposes of harassment.

Honey Shara acted in bad faith seeking to interfere with the distribution of the Film in collaboration with Sarandon and Tsitoghdzian (*id.* ¶357); and (iii) that they acted with “malice” are mere conclusions. Plaintiff has failed to plead facts to push these allegations across the line of plausibility. Based upon the foregoing, these claims should be dismissed.

III. PLAINTIFF FAILED TO SUFFICIENTLY ALLEGE HIS FRAUD CLAIM AGAINST SHARA AND TSITOGHDZIAN

“[F]raud ... requires a showing that ‘(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance.’” *JBCHoldings NY, LLC*, 931 F Supp 2d at 532; *Wall v. CSX Transp., Inc.*, 471 F.3d 410, 415–16 (2d Cir. 2006). Rule 9(b) requires that allegations of fraud particularize the approximate time and place of the allegedly false representation and describe with particularity the allegedly false representation and any allegedly fraudulent transaction, and how the particular ... transaction furthered the fraudulent scheme. *Theophilopoulos v. Cantilli*, 1989 WL 115861, at *2 (S.D.N.Y. 1989); *Todd v. Oppenheimer & Co.*, 78 F.R.D. 415, 420 (S.D.N.Y. 1978).

Plaintiff has once again failed to plead fraud with particularity. Plaintiff has mostly failed to allege the time, place, and description of the allegedly false misrepresentation, and has failed to plead any factual matter giving rise to the plausible inference that any such representation was false, facts to support a plausible inference of intent to defraud, that Plaintiff justifiably relied on such representation or that he suffered damages.

A. Plaintiff Failed to Plead Specific Factual Representations that Were False

Plaintiff’s general allegations that Shara and Tsitoghdzian made false representations about the value of the painting are not sufficiently particular. TAC ¶¶44, 57, 68. Even the allegations that arguably provide the alleged statement and time it was made do not suffice.

Plaintiff alleges (i) receiving an email from Shara dated October 25, 2016 that he had sold Tsitoghdzian's paintings at some unspecified time in the past for up to \$200,000; (ii) receiving an email dated November 30, 2016 that "mirror paintings cost 150-250,000 dollars", without reference to size (iii) Tsitoghdzian allegedly writing at some point that they were "200k paintings;" (iv) the "promises and representations by [Shara] that the value of the painting would be much higher in just a few years; and (v) the paintings "potentially much higher value that it would reach after 2016." TAC ¶¶44, 55, 67-68. Plaintiff does not make factual allegations that the statements regarding the past or current values were actually false, nor are these specific enough to determine if defendants were even talking about comparable paintings.

Moreover, the allegations that Defendants speculated about what he thought might happen in the future, cannot support an action for fraud since it is not a statement of fact. *Lanzi v Brooks*, 54 A.D.2d 1057, 1058 (3d Dep't 1976), *affd*, 43 N.Y.2d 778 (1977)(alleged statement that they would be higher in a few years, is not a statement of existing fact that is capable of fraud)(citing *Banner v. Lyon & Healy, Inc.*, 249 AD 569, *affd*, 277 N.Y. 570 (1938)); *Goldman v. Strough Real Estate, Inc.*, 770 N.Y.S.2d 94, 95 (2d Dep't 2003)("representation pertaining to the future development of the adjoining parcel did not amount to the perpetration of fraud).

Similarly, the alleged statement about the amounts Shara had sold the paintings for in the past is not alleged to be incorrect nor was it a representation of current value. Plaintiff's other allegations that auction records in 2014 or 2015 were a "fraud" orchestrated by Shara and Tsitoghdzian in 2014 and 2015 (TAC ¶69) is also insufficiently specific and barred by the 6-year statute of limitations on fraud. N.Y. C.P.L.R. § 213(8). Plaintiff's claim is literally based on nothing but rank speculation and conclusions, which do not satisfy 9(b) nor are they plausible.

B. Plaintiff Also Failed to Plead Factual Matter to Raise A Plausible Inference of Intent

While intent may be alleged generally, "we must not mistake the relaxation of Rule 9(b)'s

specificity requirement regarding condition of mind for a license to base claims of fraud on speculation and conclusory allegations.” *JBCHoldings NY, LLC*, 931 F Supp 2d at 532, *citing Lerner v. Fleet Bank*, 459 F.3d 273, 290 (2d Cir. 2006)(citation omitted)). Rather, plaintiffs must allege facts that give rise to “a strong inference of fraudulent intent.” *Id.*, *citing Space Hunters v. United States*, 500 Fed.Appx. 76, 79 (2d Cir. 2012)(*quoting Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir.1994)). Plaintiff has failed to plead with specificity that Defendants intended to defraud Plaintiff as he did not allege facts that Defendants had motive and opportunity to commit or allege facts showing strong circumstantial evidence of conscious misdoing.

C. Plaintiff also Fails to Sufficiently Plead Justifiable Reliance

As far back as early 2016 Plaintiff admits that part of his compensation would be the painting. TAC ¶10. Therefore, allegations of representations that some mirror paintings were worth \$200,000 or had high value that were made in the fall of 2016, is insufficient to raise a plausible inference that Plaintiff justifiably relied on the alleged statements when accepting the consideration. That is especially true when Plaintiff has failed to plead anything about what size paintings were being referenced or whether they were comparable to what Plaintiff would receive, and in some instances, it is clear the conversation was about different sized paintings.

Moreover, Plaintiff’s admission that the Phillips’ appraisals and auction results, that he allegedly relied on were public i.e., they were “worldwide since 2014” (TAC ¶11) further contradicts the conclusory allegation that reliance was justifiable. *Stuart Silver Assoc., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 (1st Dep’t 1997)(Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant’s misrepresentations).¹² Plaintiff alleges

¹² *Amusement Indus., Inc. v. Stern*, 786 F. Supp. 2d 758, 775 (S.D.N.Y. 2011)(motions to dismiss because of a failure

that the information he needed was publicly available, as such he has failed to plead this element.

D. Plaintiff's Fraud Claim is Barred by the Statute of Frauds

A plaintiff may not “circumvent the Statute of Frauds by ‘simply dressing up a breach of contract claim’ by alleging fraud. *Zeising*, 152 F Supp. 2d at 345 (citing cases). Where “the gravamen of Plaintiff’s fraud claim is that [the defendant] did not fulfill her side of the agreement... Plaintiff’s cause of action for fraudulent inducement sounds in breach of contract and constitutes and improper effort to circumvent the Statute of Frauds.” *Miller v Holtzbrinck Publishers, LLC*, 2009 WL 528620, at *4 (S.D.N.Y. 2009), *affd sub nom.*, 377 Fed. Appx 72 (2d Cir. 2010). Plaintiff’s repeated attempts to transform his claim for breach i.e., that he did not receive what he thinks he bargained for, sounds in breach of contract as the Producer Agreement expressly provided the consideration Plaintiff would receive and did not ascribe value.

IV. PLAINTIFF’S FRAUD, BREACH OF FIDUCIARY DUTY AND ESTOPPEL CLAIMS ARE DUPLICATIVE

The economic loss rule “prevent[s] the recovery of damages that are inappropriate because they actually lie in the nature of breach of contract as opposed to tort.” *Travelers Cas. & Sur. Co. v. Dormitory Auth.-State of N.Y.*, 734 F. Supp. 2d 368, 378-85 (S.D.N.Y. 2010); *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 16 (2d Cir. 2000); *Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc.*, 620 N.Y.S.2d 196, 181 (4th Dep’t 1994) (“The economic loss rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort”). Allegations of fraud in connection with a contract are not actionable “where a fraud claim arises out of the same facts as

to adequately plead reasonable reliance have concerned situations where a plaintiff failed to examine readily available information); *JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 406 (S.D.N.Y. 2004)(where plaintiff “has the means of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.”)(citing *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80–81 (2d Cir.1980)).¹³ Defendants intend to seek their attorneys fees under 17 U.S.C. § 505 for these objectively baseless claims.

plaintiff's breach of contract claim, with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties." *Frontier-Kemper Constructors, Inc. v. Am. Rock Salt Co., LLC*, 224 F. Supp. 2d 520, 527 (W.D.N.Y. 2002)(quoting *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 196 (2d Cir. 2001)). In such instances, "the fraud claim is redundant, and plaintiff's sole remedy is for breach." *Id.* A claim for promissory estoppel is also precluded where the plaintiffs "do not point to any promise separate and apart from the obligations under the contract" because promissory estoppel is "designed to provide a remedy in the absence of a contractual obligation." *Kyusung Cho v. Youn Tae Yoo*, 2010 WL 2469969, (N.Y. Sup. Ct. June 2, 2010); *Four Finger Art Factory, Inc. v. Dinicola*, No. 2000 WL 145466, *8 (S.D.N.Y. 2000). Similarly, "[w]here a fiduciary duty is based upon a comprehensive written contract between the parties, a claim for breach of fiduciary duty is duplicative of a claim for breach of contract" and must be dismissed. *The Najjar Group, LLC v W. 56th Hotel LLC*, 2017 WL 819487, at *4 (S.D.N.Y. 2017)(citing *Alitalia Linee Aeree Italiane, S.p.A. v. Airline Tariff Publishing Co.*, 580 F.Supp.2d 285, 294–95 (S.D.N.Y.2008)). "A breach of fiduciary duty claim is duplicative when it is based on allegations of fiduciary wrongdoing that are expressly raised in plaintiff's breach of contract claim." *Uni-World Cap., L.P. v. Preferred Fragrance, Inc.*, 43 F.Supp.3d 236, 244 (S.D.N.Y. 2014)(internal citation omitted)(breach of fiduciary duty and fraud claim dismissed as duplicative of the contract claim as they it was based on same facts and sought identical damages).

As in the SAC, Plaintiff's fraud and estoppel, as well as his breach of fiduciary duty claim, are duplicative of what Plaintiff claims Shara was allegedly supposed to have done and/or given Plaintiff in the Producer Agreement. As they are based on the same allegations in Plaintiff's breach of contract claim and seek the same damages, these claims should be dismissed.

V. PLAINTIFF ALSO FAILED TO SUFFICIENTLY ALLEGE PROMISSORY ESTOPPEL AGAINST SHARA, SARANDON AND TSITOGHDZIAN

A plaintiff must show the four traditional elements of promissory estoppel: 1) a promise; 2) reliance on the promise; 3) an injury caused by reliance; and 4) an injustice if the promise is not enforced. *Ladouceur v. Credit Lyonnais*, 159 F. App'x 302, 303–04 (2d Cir. 2005). In addition, a plaintiff must show “extraordinary circumstances” justifying relief. *Ladoceur*, 159 F. App'x at 303-04. *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 78–79 (2d Cir.1996).

There must be more than simply oral evidence to support a plaintiff's promissory estoppel claim. *Perreca v. Gluck*, 295 F.3d 215, 225 (2d Cir. 2002). Plaintiff's TAC still only contains conclusory allegations about Shara, Sarandon and Tsitoghdzian failing to fulfill the oral promises to provide “any signed paperwork necessary.” TAC ¶¶, 60, 340, 389. However, despite knowing that allegations of oral promises alone are insufficient, Plaintiff has failed to remedy this issue. Reliance is also not plausible given the allegations that Plaintiff is an experienced filmmaker and knew written consent was required.

Indeed, such oral promises cannot be enforceable where section §51 of the New York Civil Rights Law affords all individuals, including Sarandon and Tsitoghdzian, the right to control the use of their name, portrait, picture and voice and prohibits use of same for advertising or “purposes of trade without the written consent first obtained.” N.Y. Civil Rights Law §51. Courts routinely find that oral agreements are not sufficient for such a consent. *Brinkley v. Casablancas*, 80 A.D.2d 428, 434 (1st Dep't 1981)(“Oral consent is not a defense”)(citing *Lomax v New Broadcasting Co.*, 18 A.D.2d 229 (1st Dep't 1963)); *Felicie, Inc. v. Leibovitz*, 67 A.D.2d 656, 657 (1st Dep't 1979)(lower court and Special term had dismissed oral agreement on the grounds that it ran afoul of the statute of frauds contained in *inter alia* “sections 50 and 51 of the Civil Rights Law; that the contract is consequently void; and that ... being void, inducement of breach thereof

is not actionable”, only reversing for failure to plead statute of frauds as an affirmative defense). Plaintiff’s promissory estoppel claim is nothing more than a transparent attempt to avoid the built-in statute of frauds in N.Y. Civil Rights Law §§50 and 51, and GOL 5-701(a)(1). Such an attempt contravenes public policy. That Sarandon participated in filming also is not enough to make this claim plausible. *Brinkley v. Casablancas*, 80 A.D.2d 428, 434 (1st Dep’t 1981)(“it is well-established that consent to have a photograph taken does not equate with written consent to use for advertising or trade purposes, which consent is expressly required by the right to privacy statute.”) Plaintiff has also failed to allege substantial injustice. The only injustice would be if this Court allowed Plaintiff to contravene well settled policy requiring written consent.

VI. THE COPYRIGHT INFRINGEMENT CLAIMS ARE NOT SUFFICIENTLY PLED

Plaintiff’s alleged plagiarism claim against Sarandon and Tsitoghzyan is not a proper cause of action. *See Biswas v Rouen*, 2019 WL 5260821, at *3 (S.D.N.Y. Oct. 16, 2019), *aff’d*, 808 Fed Appx 53 (2d Cir 2020)(citing *Leary v. Manstan*, 2018 WL 1505571, at *2 n.1 (D. Conn. March 27, 2018))(“True plagiarism is an ethical, not a legal offense and is enforceable by academic authorities, not courts.”)(quoting Black’s Law Dictionary 1170 (7th ed. 1999)). Alleged plagiarism of a work that is copyrightable subject matter would be pre-empted by the Copyright Act and would have to be treated as a claim for copyright infringement.

Federal copyright law preempts all state-law claims regarding rights that are equivalent to the exclusive rights protected by the Copyright Act. 17 U.S.C. § 301(a); *Briarpatch Ltd., L.P v Phoenix Pictures, Inc.*, 373 F3d 296 (2d Cir 2004)(the preemption doctrine extends to any federal statute that both preempts state law and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of action.) However as set forth below, even to the extent the Court treats the allegations of plagiarism as a claim for Copyright Infringement, the claims must still fail.

To state a claim for copyright infringement, two elements must be proven: (1) ownership

of a valid copyright, and (2) copying of constituent elements of the work that are original. *PaySys Intl., Inc. v Atos Se, Worldline SA, Atos IT Services Ltd.*, 226 F.Supp.3d 206, 215-16 (S.D.N.Y. 2016). In order to establish a claim of copyright infringement, a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff's work; and (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectible elements of plaintiff's work. *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 602 F.3d 57 (2d Cir 2010). To survive dismissal, a complaint alleging copyright infringement must allege: (1) which specific original works are the subject of the copyright claim; (2) that plaintiff owns the copyrights in those works; (3) that the copyrights have been registered in accordance with the statute; and (4) by what acts and during what time the defendant infringed the copyright. *Energy Intelligence Group, Inc. v Jefferies, LLC*, 101 F.Supp.3d 332 (S.D.N.Y. 2015).

A. Plaintiff Has Failed to Allege Copyright Infringement Against Sarandon Based on Allegedly Playing a Nurse in an Emergency Room

Plaintiff's claim that Sarandon committed copyright infringement by playing a nurse in an emergency room in the film *Viper Club*, which has nothing to do with this Action is both far beyond the leave that Plaintiff was given to amend, i.e. to try to cure deficiencies in the claims he asserted, and blatantly frivolous. It is beyond cavil that Plaintiff is slinging mud at the wall to force Defendants to waste tremendous resources, without any proper purpose.

As an initial matter, Plaintiff has failed to allege that by allegedly playing a nurse, Sarandon committed an act of infringement i.e. that Sarandon violated one of the exclusive rights of an alleged copyright owner. To allege copyright infringement, a complaint must plead "(1) the specific original works [that] are the subject of the copyright claim; (2) that plaintiff owns the copyrights in those works; (3) that the copyrights were registered in accordance with 17 U.S.C. §

411; and (4) the acts by which ... the defendants infringed the copyright.” *DigitAlb, Sh.a v. Setplex, LLC*, 284 F. Supp. 3d 547, 554 (S.D.N.Y. 2018). With respect to the fourth element, plaintiffs must plausibly allege: “[a] the defendant has actually copied the plaintiff’s work; and...[b] the copying is illegal because a substantial similarity exists between the defendant’s work and the protectible elements of plaintiffs.” *Reece v. Marc Ecko Unltd.*, 2011 WL 4112071, at *6 (S.D.N.Y. Aug. 19, 2011), *report adopted*, 2011 WL 4069637 (S.D.N.Y. 2011)(citing *Peter F. Gaito Architecture, LLC v. Simone Dev Corp.*, 602 F.3d 57, 63 (2d Cir. 2010)).

More importantly, however, it is black letter law that copyright law does not protect *ideas*. 17 U.S.C. § 102. Indeed it has long been black letter law in this Circuit that basic character types and stock figures are not copyrightable or covered by a copyright in a play or screenplay. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930)(dismissing copyright infringement claims and holding it was “scarcely credible that she should not have been aware of those stock figures, the low comedy Jew and Irishman” noting that the defendant had only used what their “prototypes have contained for many decades” and that to allow such generalization “would allow her to cover what was not original with [plaintiff].”)); *Warner Bros. Inc. v Am. Broadcasting Companies, Inc.*, 720 F.2d 231, 243 (2d Cir 1983)(rejecting a copyright infringement claim against a superhero with some of the superhero traits popularized by the Superman character and now widely shared within the superhero genre). Plaintiff has failed to allege anything about the alleged nurse in his film “16 Hours” that would make it anything other than a stock character that, which as a matter of law is not copyrightable.

The *scènes à faire* doctrine prevents “stock characters” from receiving copyright protection. *See Lewinson v. Henry Holt & Co., LLC*, 659 F. Supp. 2d 547, 567 (S.D.N.Y. 2009)(citing *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir.2004)) (“A stock character is a stock

example of the operation of the [scènes à faire] doctrine....”); *Walker*, 784 F.2d at 50 (explaining that stock characters are not protectable); *Hoehling*, 618 F.2d at 979 (same); *CK Co. v. Burger King Corp.*, 1994 WL 533253, at *4 (S.D.N.Y. 1994)(“[C]opyright law does not protect stock characters ... standard in the treatment of a given topic.”), *aff’d*, 122 F.3d 1055, 1055 (2d Cir.1995)). Indeed, “it would be difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright licenses, even though such stereotyped characters are the products not of the creative imagination but of simple observation of the human comedy.” *Lewinson v. Henry Holt & Co., LLC*, 659 F. Supp. 2d 547, 567–68 (S.D.N.Y. 2009)(quoting *Gaiman*, 360 F.3d at 660 (quoting *Nichols*, 45 F.2d at 121–22)(internal citations omitted)). There is no protection for common elements in police fiction, such as “drunks, prostitutes, vermin and derelict cars” and “foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop”. See *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986).

[T]he Copyright Office does not register claims of copyright for characters. During litigation, those claiming to own character copyrights thus do not have the benefit of the presumption of validity that accompanies registration. Accordingly, the plaintiff in such a copyright infringement action must allege sufficient facts regarding the character's distinctive delineation so as to plausibly support the inference that the character warrants copyright protection.

Conan Properties Int'l LLC v. Sanchez, 2018 WL 4522099, at *13 (E.D.N.Y. 2018), *r&r adopted as modified*, 2018 WL 3869894 (E.D.N.Y. 2018)(citing *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, 149 F.Supp.3d 1167, 1172-74 (N.D. Cal. 2015)).

Plaintiff's claim is nothing more than the assertion that he owns the idea of a nurse in an emergency room, which is frankly speaking ridiculous. Plaintiff has not alleged any information about his character that would create a plausible inference that it was anything more than an unprotectable stock character. TAC, ¶¶ 95, 131. Nurses are commonly portrayed as working in

emergency rooms, because that is in fact one of the places a nurse would work. A common idea of a nurse in an emergency room without unique expression is the definition of what is intended to be unprotectable under the *scènes à faire* doctrine, and as such, Plaintiff's copyright infringement claim fails. Plaintiff has failed to allege any protectable similarities between the character in his film "16 Hours", and Sarandon's character in the film "Viper Club," let alone sufficient facts to create a plausible inference that they are substantially similarity, as required for an infringement claim. Plaintiff's TAC lacks sufficient allegations, and must be dismissed.¹³

B. Plaintiff Failed to Allege that Tsitoghdzian or Honey Shara Exceeded the Scope of the Licenses he Allegedly Gave

Where the existence of a license is not in question, "a copyright holder must plausibly allege that the defendant exceeded particular terms of the license" to state a viable claim. *Yamashita v. Scholastic Inc.*, 936 F.3d 98, 105 (2d Cir. 2019). With respect to the second prong of copyright infringement, ordinarily "[a] copyright owner who grants a nonexclusive license to use his copyright material waives his right to sue the licensee for copyright infringement." *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998)(citations omitted); *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 235–36 (2d Cir. 2008)(quoting *Graham*, 144 F.3d at 236); *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007)(same); Disputes involving the scope of a license present courts with a question of contract. *Spinelli v Natl. Football League*, 903 F3d 185, 197 (2d Cir 2018). Here, despite alleging licenses, Plaintiff has failed to also allege how they were exceeded. Plaintiff has failed to allege how him giving a copy of the Film to Tsitoghdzian is a violation of one of Plaintiff's exclusive rights. It cannot be as it was Plaintiff that undertook the action. TAC ¶349.

Plaintiff has also failed to plead that Honey Shara exceeded the scope of an alleged license. Indeed, Plaintiff alleges that he provided her with a copy for the purpose of her sending a copy of

¹³ Defendants intend to seek their attorneys fees under 17 U.S.C. § 505 for these objectively baseless claims.

the Film to her “friend”—which Plaintiff seemingly alleges that she did. TAC, ¶358. That Honey Shara allegedly sent the Film to her friend Tsitoghdzyan does not exceed the scope of the alleged license. As such these claims must be dismissed. *Latour*, 12 F. Supp. 3d at 663 (dismissing copyright infringement claim on the pleadings where plaintiff had provided a non-exclusive license to the work purportedly infringed); *Kousnsky*, 631 F. App’x at 24 (plaintiff could not bring a copyright infringement claim against defendant as a matter of law for selling works pursuant to a license); *see also Yamashita*, 936 F.3d at 105 (dismissing complaint where license was not in question and defendant failed to allege any breach of any specific license term).

Further, with respect to the “text” Plaintiff claims Tsitoghdzyan allegedly infringed upon, Plaintiff has utterly failed to provide Defendants with the adequate notice needed to sufficiently plead a copyright infringement claim. TAC ¶352. To adequately state a claim for copyright infringement, plaintiffs must plead which specific original works are the subject of the copyright claim to ensure that defendants have adequate notice of the identity of the copyrights infringed. *Energy Intelligence Group, Inc. v Jefferies, LLC*, 101 F Supp 3d 332 (S.D.N.Y. 2015) Here Plaintiff has failed to identify what “text” he is referring to, how it was used, or the time frame infringed. Plaintiff’s copyright infringement claims should be dismissed.

VII. PLAINTIFF FAILED TO SUFFICIENTLY ALLEGE THE DEFAMATION CLAIM AGAINST SHARA AND TSITOGHDZIAN

Under New York law, to state claim for defamation, plaintiff must allege: (1) written or spoken defamatory statement of and concerning plaintiff; (2) publication to third party; (3) fault; (4) falsity of defamatory statement; and (5) special damages or per se actionability. *Kesner v Dow Jones & Co., Inc.*, 515 F Supp 3d 149 (S.D.N.Y. 2021), *appeal dismissed* (Apr. 16, 2021). There is particular value in resolving defamation claims at the pleading stage, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected

freedoms. *Id.* At the pleading stage, a plaintiff must “plead sufficient facts to make it plausible—not probable or even reasonably likely—that a reader familiar with ... Plaintiff would identify him as the subject of the statements at issue.” *Elias v. Rolling Stone LLC*, 872 F.3d 97, 105 (2d Cir. 2017). Defamation claims brought under New York law are subject to a one-year statute of limitations. *Biro v Conde Nast*, 963 F.Supp.2d 255, 266 (S.D.N.Y. 2013), *affd*, 807 F.3d 541 (2d Cir 2015), *and affd*, 622 Fed Appx 67 (2d Cir 2015).

The TAC is utterly devoid of any alleged statements that could be considered to be defamatory, let alone defamatory against the Plaintiff. Tsitoghdzyan and Shara saying to the press in 2017 that the Film would be distributed (TAC, ¶¶108, 351) is not defamatory, is not a statement of existing fact that is capable of truth or falsity nor is it about Plaintiff. Tsitoghdzyan allegedly stating in a July 25, 2019, interview that the Film’s screening was cancelled because Plaintiff took the Film out of the screenings completely (TAC, ¶¶191, 350) is also not defamatory, where Plaintiff himself admits that he did in fact cancel the screening along with Shara, and therefore the alleged statement is not false. TAC, ¶191. Shara stating that he is a producer of the movie instead of an executive producer in a February 18, 2019, television interview (TAC, ¶¶333, 336) is also not a defamatory statement, nor is it about plaintiff.

Moreover, Plaintiff’s defamation claim should be dismissed the alleged statements were allegedly made prior to or in 2019 and are therefore barred by the one-year statute of limitations.

VIII. PLAINTIFF’S UNJUST ENRICHMENT CLAIM AGAINST ALL DEFENDANTS IS BARRED BY THE EXISTENCE OF THE PRODUCER AGREEMENT

To state a claim for unjust enrichment under New York law a plaintiff must show that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff. *Bayne v Target Corp.*, 108 UCC Rep Serv 2d 1062 (S.D.N.Y. Sept. 23, 2022)

“An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.” *Id.* (quoting *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 944 N.Y.S.2d 732, 967 N.E.2d 1177, 1185 (2012)). Accordingly, an unjust enrichment claim “will not survive a motion to dismiss where plaintiffs fail to explain how their unjust enrichment claim is not merely duplicative of their other causes of action.” *Id.* (quoting *Campbell v. Whole Foods Mkt. Grp.*, 516 F. Supp. 3d 370, 393 (S.D.N.Y. 2021)(internal quotation marks omitted)).

Plaintiff’s claims that the Defendants were enriched by the Film being made while Plaintiff was unable to distribute the Film is expressly covered by the Producer Agreement. Specifically, Plaintiff explicitly contracted all rights to the distribution of the Film in the Producer Agreement. TAC, Ex. 7. As such, Plaintiff cannot bring an unjust enrichment claim against Shara or the Remaining Defendants. Indeed numerous decisions applying New York law have held that an unjust enrichment claim is barred “if there is a valid contract governing the subject matter of the dispute, even if one of the parties to the claim is not a party to that contract.” *Mueller v Michael Janssen Gallery Pte. Ltd.*, 225 F.Supp 3d 201, 207 (S.D.N.Y. 2016)(citing *Vista Food Exch., Inc. v. Champion Foodservice, LLC*, 124 F.Supp.3d 301, 312 (S.D.N.Y. 2015)(emphasis added); *Maor v. Blu Sand Int’l Inc.*, 143 A.D.3d 579 (1st Dep’t 2016)(barring unjust enrichment claim because “there can be no quasi-contract claim against a third-party nonsignatory to a contract that covers the subject matter of the claim”)).

The subject matter of Plaintiff’s unjust enrichment claim, i.e. Plaintiff being unable to distribute the Film, is covered by the Producer Agreement, and therefore should be dismissed.

IX. PLAINTIFF FAILED TO SUFFICIENTLY ESTABLISH THE BREACH OF FIDUCIARY DUTY CLAIM AGAINST SHARA

Under New York law, the elements of a claim for breach of a fiduciary obligation are: (1) the existence of a fiduciary duty; (2) a knowing breach of that duty; and (3) damages resulting

therefrom. *In re Stillwater Capital Partners Inc. Litig.*, 851 F Supp 2d 556 (S.D.N.Y. 2012). A fiduciary relationship may “arise when one has reposed trust or confidence in the integrity [] on another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another.” *Mueller v. Michael Janssen Gallery Pte. Ltd.*, 225 F. Supp. 3d 201, 205 (S.D.N.Y. 2016); *N. Shipping Funds I, LLC v. Icon Cap. Corp.*, 921 F. Supp. 2d 94, 101 (S.D.N.Y. 2013). Under New York law, when parties deal at arm's length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances. *See N. Shipping Funds I, LLC v Icon Capital Corp.*, 921 F.Supp.2d 94 (S.D.N.Y. 2013).

No facts were pled, let alone extraordinary circumstances, that would allow the Court to plausibly infer the existence of a fiduciary relationship. Plaintiff's self-serving conclusory allegation that Shara and Plaintiff had “a mutual [fiduciary] duty” is not sufficient. TAC ¶18. It is precisely this type of self-serving conclusory recital of an element of a claim that is not entitled to a presumption of truth and which must be disregarded. *Icon Capital Corp.*, at 94.

X. PLAINTIFF FAILED TO SUFFICIENTLY PLEAD THE CIVIL CONSPIRACY CLAIM AGAINST SHARA, SARANDON, TSITOGHDZIAN OR HONEY SHARA

In order to state a claim for common law conspiracy, plaintiffs must allege (1) a corrupt agreement; (2) an overt act in furtherance of that agreement; (3) the party's intentional participation in furthering the plan; and (4) resulting damages. *Heinert v. Bank of Am. N.A.*, 835 F. App'x 627, 632 (2d Cir. 2020)(citing *Kashi v. Gratsos*, 790 F.2d 1050, 1055 (2d Cir. 1986)); *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 176 (2d Cir. 2012). Failure to recognize or prevent fraud does not constitute an overt act. *See Ritchie Capital Mgt., L.L.C. v Gen. Elec. Capital Corp.*, 121 F Supp 3d 321, 339-40 (S.D.N.Y. 2015), *aff'd*, 821 F.3d 349 (2d Cir. 2016). Plaintiff has failed to allege facts to create a plausible inference of these elements here.

Moreover, “New York does not recognize an independent tort of conspiracy.” *See Kirch*, 449 F3d at 401. As Plaintiff’s other tort claims fail, so must Plaintiff’s lone remaining civil conspiracy cause of action. Even if the breach claim were to survive in some part, this claim must fail as there is no claim for conspiracy to breach a contract. *Raine v Lorimar Productions, Inc.*, 71 BR 450, 453-54 (S.D.N.Y. 1987)(It is well established under New York law that no cause of action by a party to a contract will lie for conspiracy to breach the contract).

XI. PLAINTIFF’S TAC SHOULD BE DISMISSED WITH PREJUDICE

Dismissal here should be with prejudice, even where plaintiff is a pro se litigant. “If a liberal reading of [a *pro se*] complaint gives any indication that a valid claim might be stated, a court should grant leave to amend at least once before dismissing it with prejudice.” *Owens v. N.Y.C. Dept. of Sanitation*, 2013 WL 150245, at *3 (S.D.N.Y. 2013)(dismissing claims that had no legal basis with prejudice, and providing plaintiff, “for the first and last time”, the opportunity to replead a few claims dismissed for pleading deficiencies)(citation omitted); *Thorsen v. Sons of Norway*, 996 F.Supp.2d 143, 167 (E.D.N.Y. 2014)(finding “that [an] additional opportunity to re-amend would be futile and that dismissal with prejudice is warranted”). As Plaintiff is already up to his third-amended complaint, one of which was in response to the Court’s prior order dismissing the amended complaint [Dkt. No.18] and the other in response to Defendant’s prior motion to dismiss the SAC, in which the Court informed Plaintiff that a fourth amendment would not be granted absent extraordinary circumstances [Dkt. No. 61], Plaintiff should not be given further leave to amend. Plaintiff has already used his opportunities to amend, has been unable to plead a claim, and any attempt to do so again would be futile and wasteful.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff’s Third Amended Complaint with prejudice, and for such other relief as is just and proper.

Dated: New York, New York
March 10, 2023

Respectfully submitted,
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